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MICHAEL RODAK, J

Supreme Court of the United States

October Term, 1973

No. 73-328

HARRY J. LEHMAN,
Petitioner,

vs.

CITY OF SHAKER HEIGHTS AND
METROMEDIA, INC.
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

QUESTION PRESENTED

The Question Presented in this proceeding is misleading, in that it presumes the Municipality "opened a forum" when that is one of the issues presented. A more accurate statement of the Question Presented is contained in Paragraph 1 of the Questions Presented in Petitioner's Petition for Writ of Certiorari filed in this Court to the Supreme Court of Ohio, as follows:

> 1. Whether the First Amendment precludes a municipality from refusing to sell political advertising when it sells all other forms of paid commercial and non-commercial advertising for display upon a transit system it owns and operates.

ARGUMENT

I. The Respondent, City of Shaker Heights, Did Not Open a Forum for Political Expression By Accepting Paid Commercial and Non-commercial Advertising on Its Transit System Vehicles.

Initially, it should be noted that the burden is upon the Petitioner to demonstrate the alleged unconstitutionality of the policy of the City of Shaker Heights in refusing *all* political advertising in its rapid transit cars. *Avins v. Rutgers*, 385 F.2d 151 (3d Cir. 1967). It is respectfully submitted that, not only has the Petitioner failed to meet this burden, but the City's policy is indeed reasonable in its application and constitutional.

In his Brief, Petitioner argues, in essence, that by accepting commercial advertising the City of Shaker Heights has opened a "forum" for constitutionally protected political expression.

Petitioner's argument has been presented previously to this Court and has been rejected. *Breard v. City of Alexandria*, 341 U.S. 622 (1951); *Valentine v. Chrestensen*, 316 U.S. 52 (1942); cited also at *Pittsburgh Press Company v. Pittsburgh Commission on Human Relations*, 41 U.S.L.W. 5055 (U.S. Sup. Ct. 1973). Simply stated, commercial advertising for the retail sale of goods and services is not within the ambit of the First Amendment. See *Wirta v. Alameda-Contra Costa Transit District*, 68 Cal. 2d 51, 54, 434 P.2d 982, 986, 64 Cal. Rptr. 430, 434 (1967); Note, *Freedom of Expression In a Commercial Context*, 78 HARV. L. REV. 1191 (1965). Consequently, the acceptance of commercial advertising by the City of Shaker Heights did not and could not open a forum for the expression of constitutionally protected political advertisement.

Moreover, in each of the cases relied upon by the Petitioner to demonstrate that a forum had been opened, the municipality had permitted the expression of *some* political speech. For example, in *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92 (1972) a Chicago ordinance which "exempted peaceful labor picketing from its general prohibition on picketing next to a school" (*Id.* at 94) (emphasis added), was held to be unconstitutional. The Court ruled that once the City of Chicago had opened a forum to protected speech (i.e., peaceful picketing), it was a depravation of the equal protection of the laws to forbid other peaceful picketing.

The instant case is entirely different. Here the City of Shaker Heights has not opened a forum for protected speech by accepting commercial advertising. Indeed, the City has rejected all forms of political advertisement, even school levies.

Likewise, in *Wirta v. Alameda-Contra Costa Transit District, supra*, the Respondent's transit district permitted "political advertising . . . in connection with and at the time of a duly called election . . . ." 68 Cal. 2d at 53, 434 P.2d at 984, 64 Cal. Rptr. at 432. Consequently, the California Supreme Court held that a forum for political expression had been opened and could not be closed constitutionally because the proposed notice was "offensive" or because of "administrative convenience."

The instant case is readily distinguishable. Here the City and Metromedia consistently have refused *all* political advertising. Secondly, in *Wirta*, it was also arguable that the plaintiff's advertisement was refused because the defendant, for matters of "administrative convenience," disagreed with the plaintiff's views. Finally, in rejecting the advertising solely because of its controversial content, the defendants in *Wirta* were exercising

wide discretion. No such discretion or possibility of discrimination exists in the instant case. We must separate those cities which reject all political advertisements from those which permit but regulate. It is the regulation which runs afoul of the constitution, not the prohibition in the context of this case.

Similar distinguishing factors were present in the finding of a "forum" in *Kissinger v. New York Transit Authority*, 274 F. Supp. 438 (S.D.N.Y. 1967); *Radical Lawyers Caucus v. Pool*, 324 F. Supp. 268 (W.D. Tex. 1970); and *Hillside Community Church v. City of Tacoma*, 455 P.2d 350 (Sup. Ct. Wash. 1969). As with the *Wirta* case, these are distinguishable from the instant case on both the explicit and implicit facts relied on by the court in each case. In *Kissinger*, a student organization sued for a declaratory judgment requiring the New York Transit Authority and an advertising company to accept posters opposing participation by the United States in the Vietnam war for display on walls in a City subway station. The evidence was that other political advertisements had been accepted but that the plaintiff's was rejected as being "objectionable to large segments of our population" (274 F. Supp. at 441). In *Radical Lawyers Caucus*, a group of radical lawyers brought a civil rights action against the state bar association and the editor in chief of the bar journal for refusing to publish an advertisement publicizing a caucus which the group was planning to hold during the state bar's annual convention. While the refusal was obstensibly based on a policy prohibiting political or editorial speech in advertisements published in the journal, the facts, however, showed and the court found that editorials and resolutions touching on political matters had, in fact, been printed (269 F. Supp. at 269-270). In *Hillside*, a transit authority had similarly rejected posters re-

lating to ending the war in Vietnam. The transit authority's contract with the advertising company gave the City the right to demand removal of any "advertisements objectionable to the City." The defendants claimed "the sole and absolute discretion to publish or refuse to publish particular advertisements" (455 P.2d at 352).

Thus, the present case is distinguishable from *Wirta*, *Kissinger*, *Radical Lawyers Caucus* and *Hillside* because the rejection of advertising here was not based on vague, standardless policies. Clearly no forum for First Amendment activities has been created on the Shaker Heights Rapid Transit cars, and Petitioner has no constitutional right to require the City and Metromedia to create such a forum.

Petitioner also asserts that his position is supported by the decisions in *Zucker v. Panitz*, 299 F. Supp. 102 (S.D.N.Y. 1969); *Lee v. Board of Regents*, 306 F. Supp. 1097 (W.D.Wis. 1969); and *Business Executives' Move for Vietnam Peace v. F.C.C.*, 450 F.2d 642 (D.C. Cir. 1971). These cases are readily distinguishable because of the medium with which they dealt. The *Zucker* case dealt with a high school newspaper; the *Lee* case dealt with a college newspaper, and the *Business Executives'* case, with a television station. The crucial issue in these cases, the existence of a "forum," was answered affirmatively because of the nature of the medium. For example, the court in the *Lee* case, at 306 F. Supp. 1100-1101, pointed out the importance of the medium thusly:

> "As a campus newspaper, the Royal Purple [the school's newspaper] constitutes an important forum for the dissemination of news and expression of opinion. As such a forum it should be open to anyone who is willing to pay to have his views published therein—not just to commercial advertisers."

Likewise, the court in *Business Executives'* emphasized that the principle involved in that case was of fundamental importance, and concerned the people's right to engage in, and to hear, vigorous public debate on the broadcast media. The court went on to say:

> "It has always been clear that the broadcast media—so vital to communication in our society—are affected by strong First Amendment interests." 450 F.2d at 649.

Both the *Lee* and *Zucker* courts found a "forum" because of the inherent nature of a newspaper, and the *Business Executives'* court made a similar finding because of the nature of television. These cases are inapplicable to a determination of whether commercial advertising on Rapid Transit cars constitutes "an important forum for the dissemination of news and expression of opinion." See Horning, *The First Amendment Right to a Public Forum*, 1969 DUKE L. J. 931; Kalvin, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1.

Furthermore, a reversal of the Ohio Supreme Court will present a serious problem to a captive audience. While this issue was raised in the *Wirta*, *Kissinger*, and *Hillside* cases, it was there rejected because the defendant transit systems accepted political advertising during election campaigns, showing by their own conduct that they were not concerned for the "captive audience." In marked contrast, the City of Shaker Heights has consistently refused all political advertising, finding that political advertising would interfere with the primary function of the Transit System and demonstrating that it is concerned with the rights of its Transit System passengers. Despite the City's consistent policy, Petitioner *would require* that his political advertising be forced on the captive, perhaps unwilling, passengers in spite of the fact that a wide range of tradi-

tional advertising media are available for his use. Such a result is required neither by law nor logic.

In fact, Petitioner readily concedes that "there is no right to a forum unless a forum has been declared to exist" (Brief of Petitioner at 18). In the instant case, the City did not open a forum to the Petitioner by displaying constitutionally unprotected commercial advertising. Since there was no forum open for the expression of political ideas, it was not a violation of Petitioner's constitutional rights to refuse to publish his political advertisement.

II. The Policy of the City of Shaker Heights in Refusing to Accept All Paid Political Advertising Is Not Arbitrary or Capricious, But Is Reasonable and Constitutional.

The City's complete prohibition on all political advertising in its rapid transit cars is particularly reasonable and appropriate because of the unique problems with captive audiences which this method of advertising presents. See *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 93, 200 (1973) (Brennan, J., dissenting); *Hague v. C.I.O.*, 307 U.S. 496, 515-16 (1939). The Courts have recognized that there is a clear distinction between advertising in rapid transit cars and the like with their attended captive audience problems in advertising and other media. For example, in *Packer Corp. v. Utah*, 285 U.S. 105 (1932), the Court pointed out that street car advertising was a special class of advertising in that other forms of advertising were ordinarily seen as a matter of choice. Thus, newspapers and magazines involve some seeking by one seeing the advertisement, and a radio or television can be turned off. But neither is the case with the hapless rider of a street car

(or a rapid transit) who is forced to endure the advertising thrust upon him.

While a passenger on a public vehicle is not entitled to a right of privacy equal to the privacy enjoyed in his own home, *Public Utilities Commission v. Pollack*, 343 U.S. 451 (1952), there are, nevertheless, some constraints on what such a captive rider must endure. Mr. Justice Black, in his concurring opinion in the *Pollack* case, defined these constraints as follows:

> "Capital Transit's musical programs (which also include commercial messages) have not violated the First Amendment. I am of the opinion, however, that *subjecting Capital Transit's passengers to the broadcasting of news, public speeches, views, or propaganda of any kind and by any means would violate the First Amendment.*" *Id.* at 366 (emphasis added).

Thus, Jusitce Black recognized that there is a definite distinction between subjecting a captive audience to commercial messages, on the one hand, and political messages, on the other.

In the instant case, the City has continuously been solicitous of the rights of its rapid transit passengers and made the reasonable decision to prohibit all political advertising, which still permits the Petitioner and those similarly situated to use all other advertising media. Now, however, Petitioner would erase this line, forcing the City into the untenable position of having to accept his political advertising and thereby risk violating the constitutional rights of its rapid transit passengers.

In addition, political advertisements in the cars of the Shaker Heights rapid transit, would suggest, on the one hand, some political favoritism is being granted to candidates who advertise, or, on the other hand, that the candidate so advertised is being supported or promoted by the government of the City. The City itself should not

and does not use public funds or public property for the advancement or promotion of any public candidate or political issue. It follows, therefore, that the City should not lend public facilities to the same end.

Moreover, should the City open the political forum by accepting some political advertisements, or should the City be so ordered by this Court, the linear feet of advertisement space might well be consumed by the many candidates and issues which proliferate 60 days prior each election. Upon demand, the City would then sell out its space to political advertisers and lose valuable pre-Christmas customers who would seek other media and might not return. A regulation by the City dividing the space available into a percentage for political and a percentage for commercial advertising would surely come under attack. Therefore, a total denial to political advertisement is a reasonable solution to this segment of the problem.

In summary, there exists reasonable and constitutionally valid reasons for the policy of the City of Shaker Heights in refusing to accept any and all political advertising for its rapid transit cars. Therefore, the judgment below should be affirmed.

CONCLUSION

The courts below correctly found that plaintiff-petitioner's constitutional rights were not violated by the long-standing policy of the City of Shaker Heights.

The evidence in the case and plaintiff-petitioner's legal argument do not disclose any wrongful discrimination on the part of the City. No deprivation of rights protected by the First and Fourteenth Amendments to the United States Constitution (or Article I, Section 11, of the Constitution of the State of Ohio) has occurred, because no forum for the unrestricted expression of all

forms of ideas has been created or established. The City has not opened up its transit cars to any exchange or presentation of ideas, political or otherwise. The sale of space for commercial advertising does not create such a forum or confer First Amendment rights. No court has so held.

The judgment below should be affirmed.

Respectfully submitted,

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